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No. 82-784

In the Supreme Court of the United States

October Term, 1982

VERDIA JONES,
Petitioner,

vs.

CLARKSDALE MUNICIPAL SEPARATE SCHOOL DISTRICT, ROBERT BIRDSONG, LEON PORTER, GLENN D. GATES, MAYO WILSON, JESSIE G. HUGHES, JR., ROBERT ELLARD, TERRY MOOD,
Respondents.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Petitioner asks this Court to issue a Writ of Certiorari to the Court of Appeals for the Fifth Circuit in order to determine whether it erred in affirming the judgment of the District Court without requiring that Court to submit her claims for compensatory and punitive damages to a jury for determination. She is not entitled to the issuance of such a writ. She did not have a right to a determination of such issues by a jury. She did not file a demand for a trial by jury of such issues after the Judge of the District Court had refused to grant defendants (now respondents) their demand for a trial by jury of such issue. She never made known to the Judge of the District Court who tried the case that she wished to have a trial by jury of such issues. She was present and participated in a four-day trial without making known to the District Judge her desire for a trial by jury of such issues. She failed to show that she had been discriminated against because of her race in an employment discrimination case brought under Sections 1981 and 1983, the Equal Protection Clause of the 14th Amendment, and Title VII of 42 U.S.C. §2000e. Hence she would not have gotten to the jury for a determination of these issues even if the Judge of the District Court had empaneled a jury of his own volition.

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STATEMENT OF THE CASE

On September 23, 1977, petitioner Verdia Jones, a former counselor in the Clarksdale, Mississippi school system, filed her complaint against respondents, members of the Board of Trustees of the Clarksdale Municipal Separate School District; the School District; Dr. Robert M. Ellard, Superintendent of Schools; and Terry Mood, Principal of the Clarksdale High School, basing it on (a) Section 1981 of the Civil Rights Act of 1866 and Section 1983 of the Civil Rights Act of 1871 (42 U.S.C. §1981 and §1983), (b) the equal protection clause of the Fourteenth Amendment

to the Constitution of the United States, and (c) the Singleton Provision of *Henry*, which was the school desegregation case against the School District, seeking reinstatement of her contract with the School District, with the same job responsibilities as were held by her prior to the order of this Court in *Henry* rendered January 10, 1970, with back pay plus compensatory and punitive damages. She contended that she had been discriminatorily discharged by the School District because of her race, which was black.

It appeared that petitioner's employment with the Clarksdale Municipal Separate School District had begun as a teacher-counselor during the school year 1962-63. In September, 1963, she became a full-time counselor at the then all-black Higgins High School, where she continued in such position until February, 1970, when she was employed by the School District as a counselor in Clarksdale High School for the remainder of the school year 1969-70, at a salary of $8,804.00, after an order of the District Court required the merger of the former white and former all black junior-senior high schools of the School District. She was re-employed as a Counselor in Clarksdale High School for the school years 1970-71, 1972-73, 1973-74, 1974-75, 1975-76, at a constantly increased salary.

Petitioner was re-employed as Career Awareness Counselor, in the Migrant Program of the School District, for a 10-month period, including the school year 1976-77, at a salary of $12,895.00, the same as that received during the preceding school year for an 11-month period of service. She was, of course, required to perform duties as Migrant Career Awareness Counselor, as her contract required.

During the school year 1976-77, the Board of Trustees of the Clarksdale Municipal Separate School District,

through Dr. Ellard, its superintendent of schools, offered plaintiff a contract of employment for the school year 1977-78, conditioned upon the availability of Title I funds. It was rejected by her because of it being conditioned upon the availability of Title I funds.

Despite the fact that all other contracts made by the Board of Trustees of the School District with employees who were to be paid from Title I funds had similar clauses to the one which petitioner found so offensive, Dr. Ellard, at petitioner's insistence, agreed to ask the Board of Trustees of the School District to delete the offending paragraph from petitioner's contract. He did so, just as he had promised to do. The Board of Trustees of the School District refused his request on the ground that if it deleted it from one contract, it would have to delete it from all contracts, which it was forbidden by laws so to do. It had approximately 75 employees, about equally divided between white and black, who were employed under such contracts.

At the Board of Trustees' direction, Dr. Ellard again offered petitioner a contract of employment for the school year 1977-78, explaining to petitioner why it had to be conditioned on the availability of Title I funds. She rejected that contract also, for the same reason she had rejected the other.

Since petitioner left the school system, no other person has been hired as a counselor to take her place.

Prior to the merger in January, 1970 of the two Senior High Schools and two Junior High Schools into one High School and one Junior High School, the building known as the Bobo Building housed the white Clarksdale High School, and that known as the Dorr Building housed the white Junior High School. As a result of the merger,

all high school pupils of the School District, black and white, formed one High School, housed in the two buildings, and all junior high school pupils of the School District, black and white, formed one Junior High School, housed in the building which housed the black High School.

When, in February, 1970 petitioner was made a Counselor in Clarksdale High School, James Grimmett, a white male who had acted as Counselor in Clarksdale High School prior to the merger, was also named as a Counselor in the school. He remained in the office he had previously occupied until employed in another capacity in 1974, and Robert Eavenson, a white male, was named his successor and took over the same office.

In February 1970, petitioner was stationed in the same suite of offices in the Dorr Building as housed Mr. Joseph Hardy, a black male who had been assigned as assistant principal of Clarksdale High School. Mrs. Helen Green, a white female, was their secretary. The superintendent of schools also had his offices in the Dorr Building.

Immediately following February 1970, all records of black students formerly at Higgins High School were kept in the Dorr Building, in the suite of offices maintained for Mr. Hardy and petitioner. As soon as possible, such records were consolidated with those of other pupils in Clarksdale High School.

In May 1972, the Superintendent moved his office from the Dorr Building to the newly built Administration Center.

Mr. Kendricks, who had been made assistant principal upon the resignation of Mr. Hardy, moved into his vacated office, with Mrs. Green as his secretary. Later Kendricks, as principal, moved to an office in the Bobo Building, again with Mrs. Helen Green as his secretary.

During the school year 1974-75, when Terry Mood succeeded Mr. Kendricks as principal, James Grimmett became assistant principal and Robert M. Eavenson was named Counselor in his place.

Petitioner asserted in her original complaint that she was discriminated against in favor of the two white counselors: Mr. Grimmett, who served with her from February 1970 through the school year 1973-74, and Mr. Eavenson, who served with her from the school year 1974-75 to her refusal of re-employment in 1977. The District Judge disagreed with her conclusions, holding that petitioner was not discriminated against in favor of either of her white counterparts.

On November 22, 1977, five days after the filing of an answer to petitioner's complaint, respondents (defendants in the District Court) filed their demand for a jury trial of certain issues in the case:

"DEMAND FOR TRIAL BY JURY OF CERTAIN ISSUES ONLY

"Trial by jury in the above-entitled cause is hereby demanded by defendants of the following issues:

1) Plaintiff's claim for back pay.

2) Plaintiff's claim for compensatory damages.

3) Plaintiff's claim for punitive damages.

Dated November 22, 1977.

/s/ Semmes Luckett,
Attorney for Defendants"

Thereafter, petitioner (plaintiff in the District Court) filed her Motion to Strike in the following language:

"MOTION TO STRIKE

"Comes now the plaintiff herein and moves the Court for an order striking any and all requests of defendants for trial by jury regarding plaintiff's demand for back pay.

Respectfully submitted,

/s/ Charles Victor McTeer"

It should be noted that petitioner (plaintiff in the District Court) did not, in her Motion to Strike, specify the issues which she wishes to be tried by a jury, and that in her motion she did not demand trial by jury for all the issues so triable.

On January 3, 1978, Chief Judge William C. Keady issued the following Order in the case:

"ORDER

"The court has before it plaintiff's motion to strike demand for jury trial filed herein. In this suit, seeking redress from alleged racial discrimination in employment, plaintiff seeks injunctive relief as well as back pay under 42 U.S.C. §1981 and joins therewith claims for compensatory and punitive damages under 42 U.S.C. §1983. Apparently, defendants are of the view that because of this joinder of claims, they have a right to jury trial. We disagree. Indeed, it is well settled that there is no right to jury trial in an employment discrimination suit under §1981 or §1983 even though claims for compensatory or punitive damages are made. Lynch v. Pan American World Airways, Inc., 475 F.2d 764 (5th Cir. 1973); Harkless v.

Sweeny Independent School District, 427 F.2d 319 (5th Cir. 1970). Accordingly, it is

"ORDERED

"That defendants' demand for jury trial is hereby stricken and this cause placed on the court's nonjury calendar.

"This, 3rd day of January, 1978.

/s/ WILLIAM C. KEADY, Chief Judge
United States District Court"

It should also be noted that the District Judge, in his Order of January 3, 1978 treated plaintiff's Motion to Strike to be that which it was described to be, i.e., as a Motion to Strike, when he struck defendants' demand for jury trial and directed that the cause be placed on the court's non-jury calendar, for in it he described it as a "motion to strike demand for jury trial," to which plaintiff, now petitioner, did not object. In other words, the Motion to Strike filed by the plaintiff - now petitioner - was never considered by the District Court to be a demand by her for a jury trial on the issues of her claim for compensatory damages or her claim for punitive damages, and she never advised the District Judge that it should be so considered.

After receipt of the District Judge's Order of January 3, 1978, the attorney who drafted the demand for jury trial took another look at the authorities he had relied upon in drafting such demand and came to the conclusion that because a claim for back pay is but an integral part of the equitable remedy of injunctive reinstatement, the District Court was correct in refusing a jury trial of plaintiff's claim for back pay, but that perhaps his clients might be entitled to a jury trial on the

issues of plaintiff's claims to compensatory and punitive damages. Accordingly, on June 15, 1978, on behalf of his clients, the defendants in the District Court, he moved the District Court to reconsider its Order of January 3, 1978. At the same time such attorney admitted, in the Memorandum of Authorities submitted in connection with such motion, his error in demanding a jury trial of plaintiff's claim for back pay, and filed the same—the Motion and the Memorandum of Authorities—as required by Rule 5(a) of the Rules of Civil Procedure.

Despite the fact that copies of the Motion to Reconsider the Order of January 3, 1978, and of the Memorandum of Authorities in which the error in asking for a trial by jury of the issue of plaintiff's claim to back pay was admitted, were sent to petitioner's attorney, and despite the fact that the defendants in the District Court were taking the position now espoused by him, not a word, not a peep, was uttered by him, either in support of or in opposition thereto.

On July 12, 1978, the District Judge denied defendants' motion to reconsider his January 3, 1978 Order by this Order of that date:

"ORDER

"The court has before it defendants' motion to reconsider our January 3, 1978, order striking jury demand in this employment discrimination lawsuit. Upon due consideration thereof, it is

"ORDERED

"That defendants' motion for reconsideration is hereby denied.

"This, 12th day of July, 1978.

/s/ WILLIAM C. KEADY, Chief Judge
United States District Court"

Three days before the filing of her original complaint herein, petitioner filed a charge with the Equal Employment Opportunity Commission alleging that her employer, Clarksdale Municipal Separate School District, had discriminated against her. Robert Ellard and Terry Mood were named therein as "others who discriminated against you." On September 22, 1977, a Notice of such charge was served on Clarksdale Municipal Separate School District. *No investigation of the charge was ever made and no determination was ever arrived at that there was reasonable cause to believe that the charge was true.*

On July 18, 1978, the United States Department of Justice sent plaintiff "a right to sue the Clarksdale Municipal Separate School District letter."

Petitioner thereupon, on August 3, 1978, which was after Chief Judge Keady had refused defendants' demand for a jury trial of certain issues in the case, and after Chief Judge Keady had denied defendants' motion to reconsider his order of January 3, 1978, amended her complaint so as to include a claim under Title VII against all of respondents, including the members of the Board of Trustees, the Superintendent of Schools and the Principal of Clarksdale High School.

After a four-day trial, Chief Judge Keady (the District Judge who heard the case) handed down a 32-page Memorandum Opinion in which, after describing petitioner's complaints in detail and after delineating the facts with respect to such complaints, he held against petitioner on all facets of the case. Judgment of Dismissal with Prejudice was thereupon entered.

Petitioner then prosecuted an appeal from such judgment to the Court of Appeals for the Fifth Circuit, but no longer pursued any claim under the Singleton provisions

of *Henry*. That court, after hearing arguments in the case, affirmed the judgment of the District Court by a two to one vote. Petitioner then filed with that court a Petition for Rehearing and a Suggestion for a Rehearing en banc, which it denied; no member of the panel, which included Judge Rubin, the one who had dissented from the opinion affirming the judgment of the District Court, nor any Judge in regular active service on the Court having requested that the Court be polled on the question.

Now petitioner asks the Supreme Court of the United States to issue a Writ of Certiorari to the Court of Appeals for the Fifth Circuit in order to determine whether petitioner's claim for compensatory and punitive damages should have been tried by a jury.

Respondents state that there is no reason why a Writ of Certiorari should issue herein, no error having been committed by the Court of Appeals for the Fifth Circuit in its disposition of the action. The judgment of the District Court should have been affirmed.

SUMMARY OF ARGUMENT

"This," in the words of the late Mr. Justice Frankfurter, "should be a horse easily curried."

First, petitioner did not have a right to a jury determination of her claims to compensatory and punitive damages. The cases on that point seem to be clear, although a conclusion to that effect is not necessary to a denial of petitioner's petition. She waived whatever rights, if any, she may have had to a jury trial of those issues, as will be pointed out herein.

Second, she did not file a demand for a jury trial of those issues, as required by Rule 38 of the Rules of Civil Procedure, with the result that she waived the same. It is true that respondents (defendants in the District Court) made a demand for a trial by jury of certain issues in the case, including petitioner's claim for a trial by jury of her claim for compensatory and punitive damages, on November 22, 1977, and that petitioner had the right to rely on such demand as long as it was not denied by the Judge of the District Court. But after respondents' demand for a trial by jury of certain designated issues in the case was denied by Judge Keady, which it was on January 3, 1978, petitioner no longer had a right to rely thereon. Had she thereafter wished a jury trial of her claims to compensatory and punitive damages, she was required by Rule 38 of the Rules of Civil Procedure to demand the same, and was subject to sub-paragraph (d) thereof, which reads as follows:

> "(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. . . ."

Third, petitioner was present and participated in a four-day trial without making known to the District Judge

that she wished a jury trial of her claims for compensatory and punitive damages. The cases hold that by so doing she waived whatever right, if any, she may have had in a trial by jury of those issues. Counsel's lame excuse that otherwise he might have incurred the wrath of Judge Keady, while quite ingenious, will not hold water, particularly to those who know Counsel to be oblivious to consequences. Nor does it do Chief Judge Keady credit. To suggest that a District Judge would somehow punish an attorney who followed the requirements of the Rules of Civil Procedure is not even good nonsense. For someone who knows Judge Keady to so suggest borders on the unbelievable.

And fourth, petitioner failed to show that she had been discriminated against because of her race. Had the District Judge empaneled a jury in the case, exercising his discretionary right so to do, and had he come to the conclusion, as he did, that petitioner had not shown that she was discriminated against because of her race, he would necessarily have had to grant defendants a directed verdict in their favor. As Chief Judge Keady concluded:

> "Plaintiff's recovery of damages, actual or punitive, for emotional distress and other losses she may have experienced as an employee of the Clarksdale school system, of course, depends upon her establishing that the defendants have violated a right protected by federal or state law. She has failed to show either that she was the victim of racially discriminatory employment policies or that defendants have engaged in tortious practices for which they owe her damages. Plaintiff has also failed to show that the school board, or any of the school officials, are guilty of breach of contract. Therefore, she must be denied all relief, including injunctive relief, monetary damages, attorney fees, and costs."

ARGUMENT

Petitioner Did Not Have a Right to a Trial by Jury of Her Claims to Compensatory and Punitive Damages

The question of whether one has a right to a trial by jury of such claims is very often hard to decide. Fortunately, respondents can take the position also taken by the Fifth Circuit in this case, that it is not necessary to a decision herein to first determine if petitioner had such a right or not. She waived her right to a trial by jury of her claims to compensatory or punitive damages, if she ever had such a right.

It is the opinion of the writer that petitioner had no right to a jury trial of such issues. If Chief Judge Keady was right in deciding that defendants in the trial court had no such right (and I now know he was), including a right to a jury trial of the issue of back pay, then, under the authority of the cases cited by him, that of *Lynch v. Pan American World Airways, Inc.*, 475 F.2d 764, and *Harkless v. Sweeny Independent School District*, 427 F.2d 319, neither did petitioner. Insofar as the later introduction of petitioner's claim under Title VII is concerned, *Grayson v. Wickes Corporation*, 607 F.2d 1194, is but one of the latest cases which hold that there is no jury trial right in a Title VII action. As has been said, not all forms of monetary relief can be characterized as "legal" relief.

Petitioner Waived Any Claim She May Have Had to a Jury Trial by Her Failure to Demand One After the District Judge Had Ruled That Defendants Had No Such Right

No better answer can be made to petitioner's contention that she had a right to a jury's determination of

her claim to compensatory and punitive damages than by quoting what the Court of Appeals for the Fifth Circuit had to say about it:

> "Now, let us see what happened in this case.
>
> "The defendants filed their answer to the original complaint and timely filed a request for a jury trial for Mrs. Jones' back pay claims, compensatory damages, and punitive damages. Mrs. Jones moved to strike the demand for a jury trial on the back pay issue. The Court responded by denying a jury trial on all issues. *Mrs. Jones raised no objection to this ruling.*
>
> "Mrs. Jones then filed an amended complaint. There was no Rule 38(b) motion for a jury trial and none was ever filed. However, at a pretrial conference before a magistrate the plaintiff moved *verbally* for a bifurcated trial of the legal and equitable issues, with a jury trial on the legal issues. The magistrate denied the motion. This action was never called to the attention of the District Judge. There was no objection filed. When the case came to trial on the merits before Judge Keady, the plaintiff said absolutely nothing about the denial of the motion at the hands of the magistrate. Not a word was said about desiring a jury trial. Mrs. Jones now attempts to evade all this by saying that any complaint or objection would have been useless because the Judge had already denied the defendants' request for a jury trial. This is an attempted evasion of the undisputable fact that when the Court made that ruling at an early stage of the litigation the plaintiff had offered no remonstrance or objection whatever, thus leading the Court to believe that she agreed with that result.

"Under the circumstances, the plaintiff was under a special duty to speak out about any desire for a jury. Her counsel knew, or was certainly charged with the knowledge, that in the case of Lynch v. Pan American World Airways, Inc., 475 F.2d 764 (5th Cir. 1973), in a racial discrimination case which sought reinstatement with back pay, compensatory damages, and punitive damages, the Fifth Circuit held that the trial court properly struck the plaintiff's motion for a jury trial because the action was equitable in nature. Unless the point were raised and unless there was convincing argument to the contrary, Mrs. Jones should have expected that the District Judge would consider himself bound by the ruling in *Lynch*.

"In conclusion, we cannot countenance an effort to reverse the District Court from ambush.

"As already pointed out, plaintiff sought no review of the magistrate's ruling, which was made after the filing of an amended complaint. We have repeatedly held that in the absence of exceptional circumstances provoking a miscarriage of justice questions that are not presented to or passed on by the trial court (here, the ruling of the magistrate) will not be considered an appeal." (Citing cases.)

"What it all comes down to is that plaintiff had repeated opportunities to file a Rule 38(b) motion for a jury trial and she chose not to do it. When Judge Keady denied the defendants' motion for a jury trial the plaintiff knew that she could no longer rely on that motion to obtain a jury trial for herself but said not a word, leaving the Judge to believe that she agreed with that result. She had every opportunity to ask the trial court to review and reverse the denial

of a jury trial entered by the magistrate. She chose to pursue a policy of total silence. When the trial began there was not a word said about the lack of a jury. Now that the facts have been found against her contentions, amply supported by the record, she does here what she persistently chose not to do below—she cries that she was denied the right of trial by jury.

"Leaving aside the issue of whether she would have been entitled to a jury if she had properly sought such a trial, we firmly decline the suggestion that the District Court should be cast in error."

No one disputes that the cases hold that a party may rely on the demand of his opponent for a trial by jury.

Nor does anyone dispute that on March 19, 1979, the United States Magistrate made an order resulting from the pretrial conference of March 16, 1979, in which he recited that "upon consideration of plaintiff's motion to bifurcate trial of the legal and equitable issues in this action and for a jury trial of the legal issues, plaintiff's said motion is denied." Frankly, the writer does not remember the making of such a motion, but he does not deny that one was made. He does know, however, that the Order on pages 44 to 46, both inclusive, of the Petition for Certiorari is not a true copy of that Order. The original order in the clerk's office has no lines for the clerk of the court or his deputy to sign, and it is signed by J. David Orlansky, United States Magistrate. Hence the statement in respondents' brief in the Fifth Circuit that "plaintiff-appellant's claim that she should be accorded a jury trial on the issues of compensatory and punitive damages comes as a distinct surprise to the writer, as it doubtless will to Chief Judge Keady."

In the Order no reason is given for the denial of the motion. However, it is obvious from a reading of Rule 38 of the Rules of Civil Procedure that any such motion must be in writing, that it must be filed not later than 10 days after service of the last pleading directed to the issue sought to be determined by a jury, and that it must be filed as required by Rule 5(d) of the Rules of Civil Procedure, which means that it must be served upon the party and filed with the court either before service or within a reasonable time thereafter. It is assumed that the motion was denied because of plaintiff's failure to obey the requirements of the Rule.

As a matter of fact, knowing the ability and industry of counsel for petitioner, as does the writer of this brief, doubts arise as to whether he or his client ever desired a trial by jury of any issue in the case. After all, Chief Judge Keady is generally considered to be a most liberal judge, and no one ever thought that a jury trial of any issue in the case would be sought by plaintiff. It was because of Chief Judge Keady's bent that defendants in the lower court tried to have as many issues determined by a jury as possible.

The foregoing is not said as any reflection on Chief Judge Keady. He is an extremely able, articulate and fair minded judge. It is for that reason that in any school case the writer is fortunate enough to win, his reasoning is stressed in the Court of Appeals for the Fifth Circuit. He is well known in that court as a judge who does not decide cases against plaintiffs in school cases unless required by the facts to do so. Witness the opinion in *Henry*, 579 F.2d 916, wherein the School District was held not to be liable for attorney's fees because it had not been obdurately obstinate in adopting the desegregation plans called for by the decisions of that court.

Certainly defendants agree with the conclusions of the Fifth Circuit that when Judge Keady denied the defendants' motion for a jury trial the plaintiff knew that she could no longer rely on that motion to obtain a jury trial for herself but said not a word, leaving the Judge to believe that she agreed with that result. She had every opportunity to ask the trial court to review and reverse the denial of a jury trial entered by the magistrate. She chose to pursue a policy of total silence. When the trial began there was not a word said about the lack of a jury. Now that the facts have been found against her contentions, amply supported by the record, she does here what she persistently chose not to do below—she cries that she was denied the right of trial by jury.

Petitioner was therefore clearly responsible for following the requirements of Rule 38 of the Rules of Civil Procedure and subject to the penalty for not complying therewith. Since there is no question but that she did not comply with those requirements, she is subject to the penalty provided therein, which is -

> "(d) The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. . . ."

Petitioner Waived Her Right to a Jury Trial of the Issues of Compensatory and Punitive Damages by Being Present and Participating in a Four-Day Trial Without Making Known to the Court of Her Desire for a Jury Trial of Such Issues

Petitioner does not deny that she was present or participated in a four-day trial and that she never once asked the District Judge, at any stage of the trial, to give

her a jury trial of her claims for compensatory and punitive damages.

There are so many cases which hold that being present and participating in a trial, without making one's objection known to the trial judge, waives one's right to a jury trial and results in a waiver thereof, and there being no denial of such proposition, no citations are needed.

Petitioner seeks to get around that proposition by claiming that her insistence on her rights would raise the Court's ire. That simply is not true. It does the Court no credit to suggest it. All petitioner had to do to pursue her right to a jury trial, if she was entitled to one, was to ask the court for a trial by jury of those issues which she wished so tried. All the District Judge could—or would—have done would have been to grant or deny her request. In any event, petitioner would have preserved her right to complaint of the actions of the District Judge. Not having done so, either by choice or for some other reason, waives her right to a trial by jury.

The District Court, by Determining That Petitioner Had Failed to Show That She Had Been Discriminated Against Because of Her Race, Precluded Any Determination by a Jury of Petitioner's Right to Compensatory and Punitive Damages and Foreclosed Petitioner From Complaining of Its Absence

Attention is called to the fact that after the trial, Chief Judge Keady declared -

> "Plaintiff's recovery of damages, actual or punitive, for emotional distress and other losses she may have experienced as an employee of the Clarksdale School system, of course, depends upon her establishing that the defendants have violated a right protected

> by federal or state law. She has failed to show either that she was the victim of racially discriminatory employment policies or that defendants have engaged in tortious practices for which they owe her damages. Plaintiff has also failed to show that the school board, or any of the school officials, are guilty of breach of contract. Therefore, she must be denied all relief, including injunctive relief, monetary damages, attorney fees, and costs."

By determining that petitioner was not entitled to monetary relief, Chief Judge Keady foreclosed any right which she may have had to complain about the absence of a jury's determination of the issues of compensatory and punitive damages. As the Court of Appeals for the Fifth Circuit said in *United States v. Williams*, 441 F.2d 637, 644 (1971):

> ". . . . Although the District Judge should have recognized Williams' right to a jury trial, he should also have directed a verdict in favor of the United States. On this ground we affirm his judgment, since no issue remained for jury determination. There is no constitutional right to have twelve men sit idle and functionless in a jury box. United States v. 243.22 Acres of Land, 2 Cir. 1942, 129 F.2d 678, Cert. denied, 317 U.S. 698, 63 S.Ct. 441, 87 L.Ed. 558."

In *Coleman v. Associated Pipeline Contractors, Inc.*, 444 F.2d 737 (1971), a Fifth Circuit case which originated in Mississippi, the court held that "since Associated was not a trespasser and the embankment was not an attractive nuisance, the contractor's legal duty to Ida Darleen Coleman could only be to refrain from willful or wanton injury," and since appellants had failed to prove their case under such theory, a directed verdict against them was appropriate. In affirming, the appellate court said:

"Normally the issue should be submitted to the jury. Nevertheless, having considered all the evidence and testimony available to the District Judge, we conclude that the Colemans have not satisfied the *Boeing* criteria. See United States v. Williams, 5 Cir. 1971, 441 F.2d 637, 644. In the factual context *sub judice*, it is evident that Associated fulfilled its duty to refrain from willfully or wantonly injuring Ida Darleen. Consequently we shall not disturb the District Court's disposition of this controversy."

In *Galloway v. United States*, 319 U.S. 372, 87 L.Ed. 1458, 1470 (1942) this Court said:

"If the intention is to claim generally that the Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century."

See also, *Cox v. City of Freeman, Mo.*, 321 F.2d 887 (1863); *Joachim Memorial Home v. Askew*, 404 F.Supp. 1154.

CONCLUSION

With apologies for the length of this brief, with a bow to the old adage that if the writer had been given more time he would have written a shorter brief, it is submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Semmes Luckett, do hereby certify that I have this day mailed, via United States mail, a true and correct copy of Respondents' Brief in Opposition to Petition for Certiorari to Hon. Charles Victor McTeer, P. O. Box 1835, Greenville, MS 38701-0173.

This 26th day of January, 1983.

/s/ Semmes Luckett
Semmes Luckett